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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

Toll Free Service Access Codes)

CC Docket No. 95-155

To: The Commission

REPLY COMMENTS OF ICB, INC.

ICB, Inc. ("ICB"), on behalf of itself and its clients, pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. §553(c), and Section and Section 1.415 of the Commission's Rules and Regulations, 47 C.F.R. § 1.415, hereby offers its reply to the further comments received in response to the Commission's 2 July 1997 Public Notice in the captioned matter.¹

In addition to its own further comments, ICB is aware of and has reviewed further comments² submitted by the following parties (in alphabetical order): The American Car Rental Association ("ACRA"); Communications Venture Services, Inc. and Richard C. Bartel ("Bartel"); Direct Marketing Association ("DMA"); MCI Telecommunications Corporation ("MCI"); New England 800 Company ("NE 800"); RCN Telecom Services, Inc. ("RCN"); Sprint Communications Company, L.P. ("Sprint"); Tellnet Communications, Inc.³ ("Tellnet"); US West Communications, Inc. ("US West"); and The 800 Users Coalition (the "Coalition").

ICB will not attempt herein to respond to each and every argument advanced by the parties on which it may have an opinion. After reviewing the further comments in light of the overall record in this proceeding, however, ICB believes there are three important points that must be addressed: (1) the need for a domain based approach to allocating toll free numbers; (2) the intrinsic value toll free numbers; and (3) the need to lift prohibitions on the private commercial exchange of toll free numbers among users.

¹ On 28 July 1997, ICB requested an extension of time until today, Friday 1 August 1997, in which to submit these reply comments. If the Commission has not granted that request, ICB hereby respectfully moves that this pleading be accepted out of time.

² The pleadings were filed under various names by the different parties. For simplicity, ICB shall herein refer to each pleading by the designated abbreviation for the party filing it. Unless otherwise indicated, we are referring to the pleading filed by that party on 21 July 1997 in the above-captioned proceeding.

³ Tellnet submitted handwritten comments (apparently via facsimile) on 22 July 1997.

I. THE NEED FOR A DOMAIN BASED NUMBER ALLOCATION SYSTEM

The commenters overwhelmingly concur that the opening of a new toll free service access code ("SAC") can have a significant adverse impact on holders of existing 1-800 vanity numbers unless the Commission takes some precaution to deal with problems such as customer confusion, misdials, unscrupulous speculation, etc. *E.g. ACRA* at 3-4; *DMA* at 1-2; *RCN* at 3-5; *800 Coalition* at 4-14.⁴ Virtually all of the commenters, however, oppose addressing this issue through either the use of lotteries or auctions, *e.g. DMA* at 4-5; *MCI* at 2-5; *Sprint* at 4-5; *US West* at 5; *800 Coalition* at 14-16, or assignment based on SIC codes, *e.g., DMA* at 8-9; *MCI* at 5-6; *NE 800* at ¶1; *RCN* at 5; *Sprint* at 5-6; *US West* at 3-4; *800 Coalition* at 16-17. The most popular proposed methods for protecting existing holders of 800 numbers all involve some form of restricting availability of the equivalent numbers in future toll free SACs, whether this be replication, rights of first refusal, or simply flagging certain numbers as unavailable for assignment.

Under the current system for allocation and assignment of toll free numbers, ICB supports and advocates the right existing holders of "vanity" numbers (in the broadest possible sense of that term⁵) to replicate or, at a minimum, restrict the availability to, the equivalent number in the 888 and future toll free SACs. As explained in its further comments, however, ICB respectfully suggests that the current system is grossly inefficient. *ICB Further Comments* at 6. When the 888 SAC was opened, it was treated

⁴ *US West* says that there is no significant problem with customer confusion or misdials between 888 numbers and the equivalent 800 numbers, but the sole basis for this assertion is its claim to have received only two complaints from callers about misdials in the past six months. *US West* at 2-3. *US West's* perception is soundly contradicted by the above-cited comments of other parties, many of which cite numerous examples. Even *US West* goes on to advocate replication of those 888 numbers in the set-aside on the theory that holders of the equivalent 800 numbers may perceive that they have an equitable right to such protection. *US West* at 4.

⁵ In discussing the scope of the further comments sought by the Commission on "vanity" numbers, the *800 Coalition* state that it prefers the term "sensitive numbers" by which it means any "toll free number [that] may require special treatment regardless of whether it spells out a corporate name or phrase." *800 Coalition* at 1 n.1. See also *DMA* at 6-7. ICB agrees. In its own further comments, ICB advocated a broad definition of "vanity" numbers. *ICB Further Comments* at 4-5. While numbers which correspond to a product, company, or brand name are obviously of great value to the holders, there are many other reasons why users may value specific numbers. The numerals themselves may have some special significance to the holder, the number may be easy to remember, or it may be a number of no particular significance in and of itself apart from having been held a long time and/or heavily marketed. Numbers that are valued by users for these or any other reason are no less deserving of protection under FCC policy that are numbers that spell something. In fact, a narrow definition of vanity numbers arguably would be discriminatory.

identical to the existing 888 SAC. Indeed, the purpose in opening the new SAC was the belief that numbers in the 800 SAC were in imminent danger of exhaustion.⁶ But replicating or otherwise restricting availability of numbers in new SACs works at cross-purposes with the objective of increasing the supply of toll free numbers.⁷

At least one large carrier agrees with ICB that a system of replication is inefficient and can lead to premature and unnecessary exhaustion of toll free numbers. *Sprint* at 3-4. But rather than proposing workable solutions to this problem, some carriers want to stick their heads in the sand and pretend the problem does not exist. *Sprint* at 2-3; *US West* at 2-3. ICB submits that it is irresponsible to deny that the problem exists simply because the solution of replication is not perfect. The problems that arise when additional toll free SACs are opened are patently obvious: customer confusion, misdials, trademark infringement, etc. The Commission should meet this problem head on by adopting a domain system for segregating toll free SACs.

ICB previously advocated the allocation or segregation of toll free number SACs on the basis of "domains," *ICB Further Comments* at 9-10, as did at least one other party. *NE 800* at ¶4-6. The Commission should seriously pursue this option. In so doing, the Commission should recognize that there are various divergent uses for toll free numbers, and not all uses have the same requirements. To fully grasp the import of this, one must first understand and fully appreciate that a large and economically significant marketing industry has grown up around the use of 1-800 numbers in this country. There can be no denying that this particular use of toll free numbers has to do with much more than simply shifting responsibility for the cost of a long distance call. It has to do with customer convenience, name and brand recognition, product placement, and a host of other commercial matters. The use of toll free numbers as a mass marketing tool, even as an actual "brand" in many cases, assumes a many-to-one calling model, *i.e.*, a number is widely published and large numbers of people use it to contact a single firm. It is precisely this type of use that gives rise to need for replication. The heavy marketing of the

⁶ ICB has previously explained that this belief may have stemmed from misinformation. *ICB Further Comments* at 3 & n.4; *see also* ICB's 27 March 1997 *Petition for Reconsideration and Clarification* at 3-4 & nn.4-5.

⁷ Some parties actually suggest replication rights across *all* future SACs, not just 888 or 877. *800 Coalition* at 3.

number, the name recognition, the brand identification ... these are all factors that make duplicating widely known and/or heavily used toll free numbers in additional SACs problematic.

There are many applications, services, and functions, however, that require the utility of toll free numbers from a billing standpoint, but which do not require the "branding" capability associated with 1-800 numbers.⁸ Not all uses of toll-free numbers are many-to-one. In recent years toll free numbers have become popular for such things as paging and voice mail, which are better characterized as one-to-one (or at least few-to-one) applications. There is no need for mass advertising or wide public recognition of such numbers. Users privately give their pager or voice mail numbers to those few who will use them. Some toll free applications, moreover, are literally one-to-one. Many small business persons have toll free numbers that are not widely distributed, but rather are used internally to dial back to their offices and/or voice mail systems while on the road. Many residential toll free numbers are obtained for the solely purpose of communicating with a child away at college. These applications do not require 1-800 numbers, vanity or otherwise, nor do they require any particular SAC. They simply require the functionality of toll free calling, not the 1-800 brand.

The Commission has already demonstrated a willingness to ascribe different rights based on the nature of use of toll free numbers, for example, the placing of equivalent 888 numbers in unavailable status was not extended to personal 800 service users on the theory that they have not commercial interest in their toll free numbers. 11 FCC Rcd 2496, 2498 (1996). It should take a further step and adopt a system that segregates toll free SACs based on type of usage. The 800 and 888 SACs, for example, could be reserved for many-to-one mass marketing and branding applications. Other uses, e.g., paging, voice mail, non-commercial residential, etc., could be placed in future SACs. There would be no need to

⁸ In recent years the telecommunications carriers have successfully introduced and marketed more and more new services (e.g., cellular, paging, voice mail, fax-based services, one-number services, etc.) for which they required the utility of toll free numbers, either for the billing system or for the portable architecture, but for which the many-to-one branding characteristics of 1-800 numbers were not required. These services were rolled out faster than the industry to open new toll free SACs. This created an incentive on the part of carriers to assure the availability of toll free numbers for such services. Large quantities of numbers were reserved for such things as paging, cellular, or voice mail. Conservation options such as using PIN codes were largely ignored, as toll free numbers were assigned to purchasers of such numbers whether or not they desired or wanted them. Some carriers even assigned toll free numbers to all the residential numbers of their subscribers, whether or not desired or needed, in some cases without the subscribers' knowledge. All of these schemes helped the carriers side step industry guidelines requiring a subscriber to be associated with each number request. The result was a dwindling supply of toll free numbers that was then false blamed on alleged "brokering" of numbers.

replicate numbers in the new SACs (at least not on the massive scale now confronting the Commission) because these SACs would not be widely advertised and marketed as toll free brands. The consuming public would come to understand that 1-800 is a commercial marketing number, whereas 1-877 is probably a personal paging or voice mail number, for example.

ICB strongly urges the Commission to pursue the domain model. The Commission should immediately issue a further notice of proposed rulemaking to seek comments on such matters as how to categorize and characterize various uses of toll free numbers; which categories of uses should be segregated into different SACs; whether or not certain types of toll free uses should be required to use PIN numbers; what grandfather rights should extend to current holders of toll free numbers that do not comply with the eventually adopted domain system; and similar issues. This matter should be expedited, and certainly should be addressed before the next toll free SAC is opened.

II. THE INTRINSIC VALUE OF TOLL FREE NUMBERS

The 800 Coalition asserts: "Telephone numbers have no intrinsic value. Any value in the number derives solely from the toll-free customer's investment in the number which stimulates customer use and/or recognition of the number." *800 Coalition* at 14. ICB could not disagree more. Consider, for example, the birth of the business now known as 1-800-FLOWERS. If, as the 800 Coalition suggests, the telephone number itself has not intrinsic value whatsoever, then the telephone number 1-800-356-9377 would have been no better or worse than any other number that might be randomly selected for the venture. If the number takes on value *only* as a result of the actions of the entrepreneur after assignment, virtually any other number would have worked just as well. Of course this is an absurd concept, for common sense dictates that 1-800-FLOWERS by any other number would not be the same.

This is not a matter of choosing between two equally viable regulatory options, it is rather a matter of correctly perceiving and acknowledging reality. In other words, it is not that the Commission should pronounce numbers to have an intrinsic value in order to make it so; rather, it is an economic fact of life that numbers *do* have intrinsic value, and any Commission toll free number policy that fails to take that into account will be constantly struggling against the grain of economic reality. A realistic toll free number policy, and one that will truly serve the needs of the user public, is one that recognizes that the need to protect a holders vested interest in a currently held number is only part of the problem—the

policy also provide a reasonable opportunity for a user to obtain a specific number in order to launch a new product or operation.

ICB is concerned that the Commission may not fully understand the full import of its adopted and proposed policies. By denying the existence of an intrinsic value in numbers; by declaring that there shall be no private interests in numbers; by advocating a system of random selection or first-come, first-serve for the allocation of numbers; and by prohibiting the exchange of numbers between users, whether for commercial compensation or otherwise, the Commission would effectively kill the toll free marketing industry that has so vibrantly grown over the past thirty years. This concept is explored more fully in the following section of this reply.

III. PRIVATE COMMERCIAL EXCHANGE OF TOLL FREE NUMBERS

As a general rule, the commenters in this proceeding do not seem to appreciate fully the ultimate significance of the anti-brokering provisions of the Commission's current toll free policy, and its significant impact not only on the issues being addressed here, but on the entire future of the toll free marketing industry as we know it. The Commission policy, as currently understood, expressly precludes a voluntary arm's length agreement between two parties to exchange rights to a toll free number for compensation. The Commission has expressly prohibited "the selling of toll free numbers by private entities for a fee."⁹ Presumably, then, all future toll free numbers are to be assigned randomly, on a first-come, first-serve basis, subject only to whatever replication rights the Commission may endorse. The Commission must carefully consider what is to become of the toll free marketing industry under this scenario. The Commission certainly is not so naïve as to believe that most, or even a significant number, of the well known toll free brands in use today are based on numbers assigned to their current holders based purely on the luck of the draw.¹⁰ To be sure, the ability of users to exchange toll free numbers for

⁹ *Second Report and Order and Further Notice of Proposed Rulemaking ("2nd R&O")*, FCC 97-123, released 11 April 1997, 62 Fed. Reg. 20147-20148 (25 April 1997) at ¶38. On ICB's information and belief, some defenders of this proscription are among the industries most active "acquirers" of toll free vanity numbers. They apparently believe that it is permissible to buy numbers, but not to sell them; much in the fashion of the small town sheriff who arrests and jails the prostitutes, while sending the patrons home to their wives.

¹⁰ RCN says that many parties, including itself, now hold the 800 version of 888 set-asides that they did not hold at the time of set-aside. RCN at 4. Hence, there have been exchanges and undoubtedly most, if not all, were for consideration.


consideration has played a significant role in the development and growth of the toll free marketing industry.

Let us assume the Commission's prohibition on the commercial exchange of numbers stands. Just how is it that the next great idea such as 1-800-FLOWERS is to be launched? The entrepreneur could mosey up to the data base, request a number, and then just keep her fingers crossed hoping that the random number assigned matches the proposed enterprise. But that is an attitude more likely attributable to people who think they are going to win the lottery rather than people who launch successful commercial enterprises. Besides, even if one is permitted to request a specific number from the database, the odds are that the desired number will have already been assigned long ago.

Commission policy is supposed to be based on the public interest. But there is no public interest basis for the Commission's prohibition on the private commercial exchange of toll free numbers between end users. Here is the scenario. An entrepreneur decides to launch a new business based on the number 1-800-NEWIDEA. After research, she learns that the desired number, 1-800-639-4332, is assigned to someone who just happens be using it for a fax machine. She contacts this user, and he is willing to release his rights to the number and have them assigned to the entrepreneur. A new business is thus launched, adding to further economic stimulation and growth. ICB respectfully submits that the public interest is served by such a transaction. And whether the entrepreneur agreed to pay any money for release of the number, and if so how much was paid, has absolutely no public interest significance whatsoever—any attempt by the Commission to obstruct such a private commercial transaction between two parties must be based on a public interest imperative that simply has not been shown here.

Respectfully submitted,

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